



September 8, 2016

Special Agent in Charge [REDACTED]
Federal Bureau of Investigation
[REDACTED]

RE: National Security Letter File No. [REDACTED]

Dear Special Agent in Charge [REDACTED]

This letter is in response to the National Security Letter (“NSL”) you served on the Internet Archive (“the Archive”) on August 24, 2016.¹ The Electronic Frontier Foundation represents the Archive in this matter.

As described in more detail below, we believe the NSL violates both statutory law and the Constitution. However, we are voluntarily notifying you that the Archive **does not possess any records responsive to the NSL request.**

As part of its commitment to transparency, and as an effort to inform its patrons and the general public about government requests for information, the Archive wishes to publish the NSL in redacted form. A proposed redacted version is attached to this letter. The Archive is **voluntarily redacting information identifying the target of the NSL and the FBI field office that issued it.** We note that the NSL contains a troubling error in its recitation of the law and the Archive’s rights. The NSL states that under 18 U.S.C. § 3511, the Archive has a right to “make an annual challenge to the nondisclosure requirement.” However, in 2015, Congress removed the provision in § 3511 that limited recipients to a single challenge annually.² It is a matter of public interest that the FBI continues to issue NSLs that incorrectly inform recipients that their ability to challenge nondisclosure requirements is limited to a single petition per year. This is especially important because several courts have concluded that the FBI’s internal procedures for reviewing these gags are inadequate to protecting recipients’ interest in speaking.³

Furthermore, the Archive believes that the NSL—and the accompanying non-disclosure requirement—is invalid for two reasons:

First, 18 U.S.C. § 2709 is inapplicable to the Archive in this matter because the Archive is a library. Under § 2709(g), the FBI cannot issue an NSL demanding records—or

¹ The 2016 NSL is dated [REDACTED] but it was served on the Archive on August 24, 2016 via its Office Manager, Christopher Butler.

² See § 502(g) of USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015), *codified at* 18 U.S.C. § 3511(a) (2016).

³ See, e.g., *Lynch v. Under Seal*, No 15-1180, slip op. at 4 (D. Md. Sept. 17, 2015) (requiring semiannual review of NSL gags); *In re Nat’l Sec. Letters*, No. 16-518, slip op. at 4 (D.D.C. July 25, 2016) (requiring triennial review of NSL gags).

imposing a nondisclosure requirement—to libraries unless they are providers of wire or electronic communications services.⁴ The NSL does not specify which of the Archive’s services it seeks records from and thus does not identify any context in which the Archive is a provider of a wire or electronic communication service.

Second, the statute authorizing the FBI’s use of NSLs is unconstitutional. On their face, 18 U.S.C. §§ 2709 and 3511 violate the First Amendment because they allow the FBI to issue self-certified nondisclosure orders or “gags” that function as prior restraints on recipients’ speech.⁵ The statute lacks both the procedural and substantive protections required by the First Amendment.⁶ For similar reasons, the NSL statute is a content-based restriction on speech that fails strict scrutiny because (1) it prevents recipients from revealing the bare fact they have received an NSL, and (2) the gag lasts indefinitely.⁷

Accordingly, we believe the Archive should not be prevented from identifying itself as the recipient of the NSL and publishing the NSL in redacted form. As you may be aware, the Archive reached an agreement to publish an NSL it received from the FBI in 2007.⁸ Although this letter does not waive any of the Archive’s rights to petition to have the statute declared unconstitutional or otherwise set aside the NSL, we are willing to discuss the possibility of reaching a mutually agreeable resolution without the need for litigation. Please contact me at your earliest convenience to discuss withdrawing the NSL and allowing the Archive to publish the proposed redacted version enclosed here, or let me know the appropriate person to talk to at the Department of Justice.

Sincerely,

Andrew Crocker
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Electronic Frontier Foundation
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Enclosure: Redacted NSL

⁴ The Archive is a library that offers “access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication . . . digitally by patrons for their use, review, examination, or circulation[.]” 18 U.S.C. § 2709(g) (citing 20 U.S.C. § 9122(1)). The State of California has recognized the Archive as a library for the purposes of the 1996 Library Services and Technology Act, 20 U.S.C. § 9122(1)(E), and the Archive has been a member of the American Library Association since 2000.

⁵ See *Alexander v. U.S.*, 509 U.S. 544, 550 (1993); *Doe v. Mukasey*, 549 F.3d 861, 879 (2d Cir. 2008) (NSLs are prior restraints); *In re Nat’l Sec. Letter*, Nos. 11-2173, 13-80089, 13-1165, Slip Op. at 32 (N.D. Cal. Mar. 29, 2016) (same).

⁶ *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976).

⁷ See *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989).

⁸ See <https://www.eff.org/cases/archive-v-mukasey>.